**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

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| SHANNON TROY "MACK" SERMON,<br><br>Claimant,<br>v.<br><br>THE COLLEGE OF IDAHO,<br><br>Employer,<br>and<br><br>ADVANTAGE WORKERS COMPENSATION INSURANCE COMPANY,<br><br>Surety,<br>Defendants. | **IC 2012-001897**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**<br><br>**FILED JAN 14 2014** |

## INTRODUCTION

The Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on May 22, 2013. Sam Johnson represented Claimant. R. Daniel Bowen represented Defendants. The parties took posthearing depositions and submitted briefs. The case came under advisement on September 25, 2013 and is now ready for decision.

## ISSUES

After due notice to the parties, the issues were identified as:

1. Whether Claimant has complied with the notice and limitations requirements of Idaho Code §§ 72-701 through -706 and whether these limitations are tolled by Idaho Code § 72-604;

2. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment;

3. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent intervening cause;

4. Whether and to what extent Claimant is entitled to the following benefits:

   (a) Temporary disability;
   (b) Medical care;

5. Whether Claimant has bipolar disorder;

6. Whether Claimant's claim is compensable under Idaho Code § 72-451.

An additional issue regarding occupational disease was withdrawn by the parties at hearing.

## CONTENTIONS OF THE PARTIES

Claimant contends he developed or exacerbated a mental health issue from being disrespected by one or more debate students whom he coached. This "psychological mishap" constitutes an accident under Idaho Worker's Compensation Law. This case should be considered a "mental-physical" claim compensable under Idaho Workers' Compensation Law, Idaho Code § 72-451. To Claimant that means that a psychological accident and injury is compensable if it also results in a physical component.

Defendants contend Claimant did not suffer an accident causing injury as required by Idaho Worker's Compensation Law. He did not report one timely. He did not file a claim timely. His condition was not caused by the "accident" he described. He was not in the course of his employment when the claimed "accident" occurred. This case should be considered a "mental-mental" claim for which compensation is precluded by Idaho Code 72-451. Moreover, the claim is barred by application of Idaho Code § 72-451(2). Claimant's claim is a sham.

## EVIDENCE CONSIDERED

The record in this case consists of the following:

1. Oral testimony at hearing by Claimant, his wife, and social worker Steven Flick;

2. Claimant's exhibits A through H, J, M, T, V, and Y-DD;

3. Defendants' exhibits 1 through 9; and

4. The posthearing deposition of Robert C. Calhoun, Ph.D.

Claimant's exhibit V is a written statement authored by Claimant's wife. It was among certain hearsay documents which were not initially admitted as hearsay whose authors were not available for cross-examination. Claimant's wife did testify at hearing. Therefore Exhibit V is admitted into evidence.

After having fully considered all of the above evidence, the Referee submits the following findings of fact and conclusions of law for review and adoption by the Commission.

## FINDINGS OF FACT

1. Claimant worked for Employer coaching Employer's intercollegiate speech and debate team.

2. Near Halloween 2010 several students, one by one and citing various individual reasons, approached Claimant for permission to miss an upcoming tournament. Claimant acquiesced and took a smaller number of students to that tournament.

3. On an evening at home, several days after Halloween, Claimant observed photographs posted to Facebook which showed that some of the students—including the team captain—who had missed the tournament had attended a Halloween costume party. Claimant responded emotionally.

4. Claimant promptly complained to administrative officers of the event but did not claim he had suffered any injury—physical or psychological—at that time.

5. In April of 2011 Claimant suffered a panic attack.

6. In October of 2011 Claimant suffered another panic attack and was hospitalized at Intermountain Hospital for psychiatric evaluation.

7. On January 23, 2012 Claimant filed a Form 1. In it he asserted the injury as "Acute Type I Bipolar Disorder."

8. He filed a Complaint on February 2, 2012.

**Medical Records**

9. The first medical record in evidence following the alleged accident is dated November 22, 2010. It reports lab data taken to monitor a preexisting cholesterol problem. It was unrevealing about any new problem or condition.

10. On April 8, 2011, Claimant visited West Valley ER with chest complaints which Claimant attributed to a panic attack. After thorough evaluation and imaging, his condition was diagnosed as a "[p]robable anxiety reaction." A cardiac consultation, including an electrocardiogram, four days later showed no abnormalities.

11. An August 11, 2011 visit to St. Alphonsus Medical Group in Caldwell ("St. Al's Doctors") for a specific physical complaint included no mention of mental health issues.

12. On October 24, 2011, Claimant visited West Valley ER complaining of symptoms of anxiety, depression and agitation. Upon further evaluation, Claimant agreed to inpatient admission at and was transferred to Intermountain Hospital.

13. On October 25, 2011, Claimant was admitted to Intermountain Hospital. He reported a history of intermittent depression since age 18, occasional panic attacks, episodes of cutting himself, and one suicide attempt. On a psychosocial assessment, he reported, "father passed away 17 yrs. ago, feels there is a connection between that and his PTSD." During the five-day admission, Claimant discussed generally his stressful duties as a speech and debate coach, but he attributed these stressors to the greater stressors associated with caring for his invalid wife. Stephen Bushi, M.D., recorded:

> He states he is getting a lot out of attending the groups and talked today about his wife, who has bone disease with brittle bones that fracture frequently and how demanding that is of his time. He talked about his debating team, which has been a very important part of his life at the University, and how many of the students dropped off the team because he was spending more time with his wife. Despite the

> fact that the team went from a total of 40 students to 14 students at the end of the year and he went to the national competition with 14 statements,[sic] he still came in eighth, which was quite good. He takes a lot of pride in his work at the University and talked about the stresses and how they brought on the depression he was experiencing prior to coming in here.

Claimant also identified, "I have a great teaching career" as a reason for living. In sum, records of Intermountain Hospital pertaining to this inpatient stay are ambiguous about whether Claimant or his treaters considered his work as a speech and debate coach to be a positive or negative stressor. The records refer to his work in general; they do not directly or specifically mention any of the events which occurred around and shortly after Halloween one year earlier; they do not support that those events were a contributor to his condition or to this hospitalization. He was discharged on October 29, 2011.

14. Post-hospitalization treatment was provided by All Season's Mental Health. A November 15, 2011, record contains the earliest documentation that Claimant alleged a link between his mental health status and the events around Halloween 2010. A December 12 psychiatric evaluation by John Casper, M.D., reported Axis I diagnoses of panic disorder without agoraphobia; PTSD, chronic; Bipolar I MRE hypomanic; Polysubstance dependence. A February 8, 2012 psychiatric evaluation by Jayne Stevenson, M.D., reported only Bipolar Affective Disorder I as an Axis I diagnosis. She also noted Claimant's worker's compensation claim and that he asserted the events around Halloween 2010 as the cause of his then-current condition. Social worker Steven Flick provided counselling.

15. At a November 18, 2011 visit to St. Al's Doctors, Claimant reported a worsening of his anxiety despite ongoing treatment.

16. On January 18, 2012, Claimant visited St. Al's Doctors. He attributed fatigue and sexual issues to low testosterone, a condition which had been identified by lab data as early

as June 2010.

17. A February 17, 2012 brain MRI showed no abnormalities.

18. On April 13, 2012, Dr. Casper released Claimant to return to work.

19. On April 25, 2012, Dr. Stevenson initialed her concurrence with four statements on a document prepared by Claimant. She altered one statement which said, "Mr. Sermon has no prior history of Bipolar Disorder." Above the word "history" she amended it by inserting the word "Diagnosis."

20. On May 2, 2012, Carl Steinmann, PA-C, at St. Al's Doctors initialed his concurrence with four out of five statements on a document prepared by Claimant. He refused to initial a statement asserting that Claimant's "illness/injury was triggered by the quarrel" with the debate team.

21. Claimant visited DHW physician Mark Kimsey, M.D., on December 27, 2012, and January 16, February 6, and March 20, 2013. Based largely upon Claimant's reported history Dr. Kimsey adjusted Claimant's medication regimen.

22. On April 8-12, 2013, Claimant was evaluated by psychologist Robert F. Calhoun, Ph.D., at Defendants' request. Dr. Calhoun also reviewed medical records and administered psychological tests. On psychological testing, Claimant's responses to the MMPI-2 produced an invalid profile. It showed Claimant was "faking bad"—that is, presenting himself as more psychologically symptomatic than either a normal or mentally ill person would. Claimant's responses to the Millon Clinical Multiaxial Inventory-3 showed a tendency to magnify illness. Claimant's responses to the Detailed Assessment of Posttraumatic Stress showed Claimant presented himself as symptomatic in a way that "bona fide, traumatized individuals" would not. Dr. Calhoun also administered the State-Trait Anger Expression Inventory-2 and the Rotter

Incomplete Sentence Blank. For Axis I Dr. Calhoun diagnosed, "Major depression, severe, recurrent, panic disorder, bipolar II disorder, rule out." He commented that Claimant's primary diagnosis would be personality disorder NOS with narcissistic features. He opined Claimant was likely psychologically affected by childhood sexual abuse and the stressors associated with caring for his wife and not likely by the events around Halloween 2010. Dr. Calhoun opined Claimant does not suffer any accompanying physical injury.

**Prior Medical Records**

23. Claimant received psychological or psychiatric treatment for years from Dr. Green who passed away about 2009. Dr. Green's records are not in this record.

24. On January 10, 1997, Claimant suffered an "anxiety attack." It included an element of chest discomfort. Paramedics were called. He told paramedics it had happened before, but this one was worse. He was evaluated at St. Luke's ER.

25. On August 29, 2002, Claimant called paramedics and visited West Valley Medical Center ER after an anxiety or panic attack.

26. On June 2, 2010, Claimant visited Drew Polson, M.D., at St. Al's Doctors to establish a professional relationship. He reported a history of insomnia and anxiety.

27. On October 25, 2010, Claimant visited St. Al's Doctors with complaints of cold symptoms, malaise, insomnia and anxiety.

**Discussion and Further Findings**

28. It is well settled in Idaho that the Workers' Compensation Law is to be liberally construed in favor of the claimant in order to effect the object of the law and to promote justice. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 910 P.2d 759 (1966). Although the worker's compensation law is to be liberally

construed in favor of a claimant, conflicting evidence need not be. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 834 P.2d 878 (1992).

29. **Credibility.** Claimant is a poor historian. He inconsistently reported his psychological history to physicians. These inconsistencies materially undermine the reliability of diagnoses by physicians and efficaciousness of counselling by his social worker. Where contemporaneously-made medical records vary from Claimant's memory at deposition or hearing, the medical records are afforded more weight.

30. Claimant's claim fails on both grounds of notice of injury and claim for compensation. He has not presented grounds upon which Idaho Code § 72-604 may be considered to save him from his untimeliness. Pursuant to Idaho Code § 72-701, claimant is required to give notice of the accident to employer within 60 days following the occurrence of the accident and make his claim within one year following the occurrence of the accident. Pursuant to Idaho Code § 72-702, the notice required by Idaho Code § 72-701 shall be in writing. Here, it is undisputed that Claimant viewed the Facebook photographs sometime in early November of 2010. However, Claimant did not file his notice of injury and claim for benefits until January 23, 2012. He filed his complaint on February 2, 2012. The record does not reveal the existence of any other writing generated between November of 2010 and January 23, 2012 that satisfies the written notice requirements of Idaho Code § 72-702. However, pursuant to Idaho Code § 72-704, a lack of written notice may be excused where a claimant is able to demonstrate: (1) that employer had knowledge of the injury or (2) employer has not been prejudiced by a lack of written notice.

31. A careful review of the record fails to demonstrate that within 60 days following the alleged accident, Employer had actual knowledge that Claimant suffered injury of some type

as a consequence of viewing the Facebook photographs. In order for written notice to be excused, it must be demonstrated that employer had "considerable knowledge" of an accident or injury such that the requirement of written notice should be excused. *See Murray-Donahue v. National Car Rental Licensee Association*, 127 Idaho 337, 900 P.2d 1348 (1995). Although it is likely true that Claimant communicated his concerns about student insubordination to representatives of the Employer shortly after Claimant viewed the Facebook photographs, those communications related to what action should be taken against the students in question. There is no evidence suggesting that within 60 days following the occurrence of the incident in question, Claimant said anything to representatives of the Employer that would lead a reasonable person to believe that Claimant felt he had suffered some type of injury as a consequence of learning of the full extent of his students' shenanigans. In short, while there is some evidence that reasonably supports the proposition that through Claimant's Employer was apprised of the fact that students skipped a debate tournament in favor of attending a Halloween party, there is no evidence to suggest that Employer also learned that this insubordination had caused some type of injury to Claimant.

32. A claimant is required to notify Employer of an accident for which he claims worker's compensation benefits within 60 days of the occurrence. Idaho Code § 72-701. Even if the inference from Claimant's testimony is that he viewed the relevant Facebook photographs sometime in early November 2010, certainly before December 2010, Claimant is still ineligible. Claimant's first psychological medical care after these dates occurred on April 8, 2010. The preponderance of evidence shows Claimant did not make a claim for injury, psychological or physical, from the claimed accident before April 2010. Claimant failed to make a *prima facie* showing that he notified Employer of a compensable accident within 60 days of the claimed

accident.

33. A Claimant must also make a claim for compensation within one year after the date of the accident. Idaho Code § 72-701. Claimant filed both his Form 1 and his Complaint untimely.

34. Next, Claimant argues that Employer has failed to adduce any proof that it has been prejudiced by want of notice, and therefore lack of timely notice should be excused. However, it is Claimant who bears the burden of proving that Employer was not prejudiced by lack of timely notice. *Ansbaugh v. Potlatch Forest, Inc.*, 80 Idaho515, 334 P.2d 442 (1959); *Murray-Donahue v. National Car Rental Licensee Association, supra*. Claimant's assertion that Employer was not prejudiced by want of notice is insufficient to meet Claimant's burden of proof.

35. Claimant has failed to give timely notice and make a timely claim as anticipated by Idaho Code § 72-701. Claimant has failed to prove that Employer had actual knowledge of the accident or injury within 60 days of the occurrence of the inciting event and has further failed to adduce proof sufficient to show that employer was not prejudiced by a want of timely notice. Therefore, Claimant's claim is barred under Idaho Code § 72-701.

## CONCLUSIONS OF LAW

1. Claimant failed to show he gave timely notice of compensable accident as required by Idaho Code § 72-701;

2. Claimant failed to show he made a timely claim for compensation as required by Idaho Code § 72-701;

3. All remaining issues are moot.

## RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation,

the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 23RD day of December, 2013

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 14TH day of JANUARY, 2014, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** were served by regular United States Mail upon each of the following:

D. SAMUEL JOHNSON
405 SOUTH 8TH STREET, STE. 250
BOISE, ID 83702

R. DANIEL BOWEN
P.O. BOX 1007
BOISE, ID 83701

dkb

/S/_____

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| SHANNON TROY "MACK" SERMON,<br>Claimant,<br>v.<br>THE COLLEGE OF IDAHO,<br>Employer,<br>and<br>ADVANTAGE WORKERS COMPENSATION INSURANCE COMPANY,<br>Surety,<br>Defendants. | **IC 2012-001897**<br><br>**ORDER**<br><br>**FILED JAN 14 2014** |

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

4. Claimant failed to show he gave timely notice of compensable accident as required by Idaho Code § 72-701;

5. Claimant failed to show he made a timely claim for compensation as required by Idaho Code § 72-701;

6. All remaining issues are moot.

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 14TH day of JANUARY, 2014.

INDUSTRIAL COMMISSION

/S/_____
Thomas P. Baskin, Chairman

/S/_____
R. D. Maynard, Commissioner

/S/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

/S/_____
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on the 14TH day of JANUARY, 2014, a true and correct copy of **ORDER** were served by regular United States Mail upon each of the following:

D. SAMUEL JOHNSON
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dkb /S/_____